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HARVARD

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A BRIEF SURVEY OF EQUITY JURISDICTION.[1]

VIII.

REAL OBLIGATIONS.

THE last five articles have been occupied with a consideration of the jurisdiction of equity over personal obligations,[2] and those articles contain all that it is thought necessary to say, in this brief survey, on that branch of equity jurisdiction.

The next topic to be considered, according to the classification of legal rights stated in the first of this series of articles,[3] is that of real obligations. The jurisdiction of equity, however, over this class of legal rights will not, it is hoped, detain us very long.

A real obligation is undoubtedly a legal fiction, *i. e.*, a fiction invented by the law for the promotion of convenience and the advancement of justice. The invention consists primarily in personifying an inanimate thing, and giving it, so far as practicable, the legal qualities of a human being. The invention was originally made by the Romans, and it has been borrowed from them by the nations which have succeeded them. It may be doubted also whether modern nations would have invented the fiction for themselves; for it is less necessary, as well as much less obvious, in mod-

[1] Continued from Vol. V. p. 138.

[2] Vol. I. p. 355, Vol. II. p. 241, Vol. III. p. 237, Vol. IV. p 99, Vol. V. p. 101.

[3] Vol. I. pp. 55-57.

ern times, than it was when the Roman State was founded. The reason of this will be found in the change which has taken place in respect to the legal consequences of personal obligations. An obligation, according to its true nature, can be enforced only against the person or thing bound by it, and, on the other hand, the person or thing bound by an obligation becomes thereby absolutely subject to the power of the obligee, in case the obligation is not performed; and this was the light in which an obligation was originally regarded by the Romans. Moreover, a personal obligation, *ex vi termini*, binds only the person (*i. e.*, the body) of the obligor or debtor, and has nothing to do with his property. Consequently, by the Roman law, when a personal obligation was broken the obligee or creditor originally had no legal means of procuring satisfaction from the debtor's property; he could compel satisfaction out of the debtor's property only indirectly, namely, by exerting his legal power over the debtor's body. It is plain, however, that the interests of debtors and creditors alike required that a debtor should be able to give a creditor the same rights against the debtor's property, or some portion of it, that a personal obligation gave him against the debtor's body, and no better or more obvious mode of accomplishing this object could be adopted than that of enabling a debtor to impose upon his property an obligation in favor of his creditor, in analogy to the obligation which he imposed upon his person, and accordingly real obligations were invented and came into use. In time, however, though indirectly and by slow degrees, creditors acquired the right, after obtaining judgments upon personal obligations, to have the same satisfied out of the debtor's property, and thus one reason for the existence of real obligations ceased. By still slower degrees, though directly and through the operation of positive law, the rights of creditors against the bodies of their debtors were curtailed, until, at the present moment, they have almost ceased to exist. The result, therefore, is that personal obligations have been so perverted that, while, according to their true nature, they can be enforced only against the persons of the obligors, they can in fact now be enforced for the most part only against their property; and a consequence of this has been, that not only the distinction between personal obligations and real obligations, but the very existence of the latter, as well as the nature and proper legal consequences of obligations generally, have been in great measure lost sight of.

It is a great mistake, however, to suppose that there is no longer any occasion for real obligations, or that they have ceased to exist. On the contrary, many of the reasons for their existence are as strong as they ever were, and accordingly they are still in daily use.

I. Although a creditor, when he has obtained a judgment against his debtor upon a personal obligation, is entitled to have the same satisfied out of the debtor's property, yet a personal obligation of itself gives the creditor no right as against the debtor's property, nor does it at all limit the debtor's power over his property; and consequently it gives a creditor no priority over other creditors of the same debtor. In short, it is only in one event that a personal obligation is a satisfactory security to a creditor, namely, that of the debtor's being solvent, and so remaining till the debt is paid. If, therefore, a creditor wishes to secure the payment of his debt, irrespective of the debtor's solvency, he must obtain some other security than a personal obligation, namely, a security upon property, either of the debtor or of some third person. Moreover, there are only two ways of accomplishing this object; namely, first, by transferring the ownership of the property to the creditor, or to some other person for his benefit; secondly, by creating an obligation upon the property in the creditor's favor. The second of these modes was the one exclusively used by the Romans in the later periods of their history, and is the one, generally at least, used by the modern nations of continental Europe, while in England and with us both are used. The Romans had two ways of creating the obligation, namely, first, by the delivery of the property to the creditor, to be held by him till the debt was paid (*pignus*); secondly, by a mere agreement between the owner of the property and the creditor, the property remaining in the possession of its owner (*hypotheca*). Originally, possession of the property by the creditor was indispensable, and so the *pignus* alone existed; but, at a later period, the parties to the transaction were permitted to choose between a *pignus* and a *hypotheca*. So long as the *pignus* was alone in use, it is obvious that the obligation could be created only by the act of the parties, as they alone could change the possession of the property. But when the step had been taken of permitting the mere agreement of the parties to be substituted for a change of possession, it was another easy step for the law, whenever it saw fit, to substitute its own will for the agreement of the parties; and hence hypothecations came to be divisible into such

as were created by the acts of the parties (conventional hypothecations) and such as were created by the act of the law (legal or tacit hypothecations). Again, so long as a change of possession was indispensable, it is plain that the obligation could attach only upon property which was perfectly identified, and that there could be no change in the property subject to the obligation, except by a new change of possession. But when a change of possession had been dispensed with, and particularly when legal or tacit hypothecations had been introduced, it became perfectly feasible to make the obligation attach upon all property, or all property of a certain description, either then belonging to the debtor or afterward acquired by him, or upon all property, or all property of a certain description, belonging to the debtor, for the time being; and hence hypothecations came to be divided into those which were special and those which were general.

Except in the particulars just stated, there was no difference between the *pignus* and the *hypotheca*. Each was alike a real obligation; and if, as generally happened, the debt was created by a personal obligation, the latter was the principal obligation, while the former was merely accessory, collateral, or incidental to the latter; and hence, whenever the principal obligation was extinguished, the accessory obligation fell with it; and this explains the fact that payment of the debt extinguished the creditor's rights in the property pignorated or hypothecated to him. Moreover, if the property belonged to some other person than the debtor, the real obligation was regarded as an obligation of suretyship, the property being regarded as a real surety for the debt, just as its owner would have been a personal surety, if he had incurred a personal obligation of suretyship; and hence the owner of the property had the same rights of subrogation, whether his property was a real surety, or he himself was a personal surety, for the debt.

If the debt was not paid when it became due, the creditor's remedy upon the real obligation against the property was closely analogous to his remedy upon the debtor's personal obligation against the debtor's body, *i. e.*, he was entitled to proceed against the property judicially, and have it condemned and sold for the payment of the debt.

The Roman law in respect to the *pignus* has been a part of the English law, under the name of pawn or pledge, from time immemorial, so far as it is applicable to movable property, and it has never undergone any material change, either in England or in this

country. As to immovable property, however, it has never been admitted, *i. e.*, it has never been possible, either in England or in this country, to impose an obligation upon land in favor of a creditor by simply placing the latter in possession of it.

The Roman hypothecation has been admitted into the admiralty law of all modern nations, so far as the limited jurisdiction of admiralty has rendered its admission practicable; but it has been rejected by the English common law, except in those cases in which it is created by the law itself. What are such excepted cases? First, when the debt is created by judgment or other matter of record, the creditor has a general hypothecation upon all land belonging to the debtor when the debt is created, or which is afterwards acquired by him; secondly, when the law permits a plaintiff, on bringing an action, to attach property, such plaintiff has a special hypothecation upon the property actually attached; thirdly, by the law of England, and of many of our States, all movable property found upon leased land when rent becomes due, is hypothecated to the landlord to secure the payment of such rent.

There is also a class of cases in our law in which debts are secured by movable property belonging to the debtor, and which have some of the characteristics of pledges, and some of the characteristics of hypothecations, but as to which it is doubtful whether they can be classed as either the one or the other, namely, cases in which the debts have been created by the performance of services by the creditor on the articles which furnish the security for the debts, and which articles have come into the possession of the creditor for the purpose of his performing such services upon them. The right of the creditor in all such cases is called a lien, and there is no doubt that all such liens are instances of real obligations. Indeed, the constant use by English and American lawyers of the word "lien" to designate the right of the creditor in these and other cases of real obligations ought to have been a reminder to them that there are such things as real obligations.

What are the remedies afforded by our law in cases of pledges, hypothecations, and liens, and to what extent, if at all, does equity assume jurisdiction over them? In cases of hypothecations which come within the jurisdiction of admiralty, courts of admiralty afford the same remedy that was afforded by the Roman law, and in such cases equity has no occasion to interfere. In cases of pledge, our law affords no judicial remedy whatever, though our courts of law hold that a pledgee has a power by implication, if the debt is not

paid when it becomes due, to sell the pledge on giving due notice to the pledgor;[1] and this remedy sufficiently answers the needs of the pledgee in the great majority of cases.[2] In cases of liens, not only does our law afford the creditor no judicial remedy, but our courts hold that he has no power of sale;[3] and thus there is held to be an important difference between pledges and liens; nor will this be a cause for surprise when it is remembered that pledges are always made by the owners of the property pledged, while liens are created by the law alone, and that the implied power of sale, in the case of a pledge, is given by the pledgor. In the case of common law hypothecations, all of which, as has been seen, are created by the law alone, the same law which creates them also provides one or more remedies for their enforcement, and these remedies have, except under special circumstances,[4] been found sufficient.

Will equity afford a remedy in the case of pledges or liens, either to the creditor or the owner of the property, when a judicial remedy is necessary? In respect to the creditor, it should be premised that, in all cases where a creditor has real security for the payment of his debt, whether his title to such security be legal or equitable, and whether it consists of ownership of the property which constitutes the security, or of an obligation upon it, equity, if it enforces the security at all, has one uniform mode of doing so, unless (as in the case of ordinary mortgages) such a mode of enforcing the security is thought to be excluded by the agreement of the parties, namely, the Roman mode of directing a sale of the property, and a payment of the debt out of the proceeds of the sale. Moreover, this is precisely the mode of enforcing the security which is called for by every consideration of justice and convenience in the case of pledges and liens. It would seem to be a case, therefore, in which there is a legal right without any legal remedy, and in which equity has a remedy which is perfect as well as easy; and therefore equity should afford such remedy, unless a power of sale in the creditor be thought to render a judicial sale unnecessary, or the amount involved be too small to warrant the interference of equity.

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[1] Pigot *v.* Cubley, 15 C. B., N. S. 701.

[2] This is evident from the dearth of direct authority upon the subject of judicial sales, under decrees in equity, at the suit of pledgees. See *infra*, p. 77, n. 1.

[3] Doane *v.* Russell, 3 Gray, 382; Briggs *v.* B. & L. R. Co., 6 Allen, 252; Busfield *v.* Wheeler, 14 Allen, 139, 143.

[4] For an instance in which equity will direct a sale of land to satisfy a lien thereon by judgment or recognizance, see Vol. IV. pp. 125, 126.

Upon authority, the question must be answered in the affirmative in respect to pledges,[1] but in the negative in respect to liens,[2] though there seems to be no good reason for such a distinction.

There is not likely to be any occasion for equity to interfere in favor of the owner of the property, in cases of pledges or liens, unless there is a controversy between him and the creditor as to the amount of the debt; for, if there be none, the former should pay the debt, and then he can recover the property at law. If there is such a controversy, however, or if for any reason the creditor refuses to accept payment, the owner of the property is entitled to file a bill to have the amount of the debt ascertained and declared, and to have the property restored to him on his paying or tendering such amount.[3] In the case of ordinary mortgages, indeed, a tender has the same effect as actual payment, so far as regards the mortgaged property. If made on the day named in the mortgage deed, either payment or tender will devest the title of the mortgagee, and revest the title of the mortgagor, while, if made after that day, neither will have any legal effect upon the title to the mortgaged property; and the reason is that a mortgage is a conveyance of the legal title to the mortgagee, subject to its revesting in the mortgagor on performance by him of a condition subsequent, namely, making payment of the debt on the day named, and only in that event; and, though actual payment alone will be a performance of that condition, yet a tender and refusal will be a good excuse for non-performance, and so will have the same effect as performance.[4] In the case of a pledge or lien, however, while

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[1] There are numberless *dicta* to the effect stated in the text, and that such is the law there can be no doubt; and yet, strange as it may seem, the writer has not found a single authority directly in point. Kent says (2 Com. 582) the pawnee "may file a bill in chancery, and have a judicial sale under a regular decree of foreclosure; and this has frequently been done in the case of stock, bonds, plate, and other chattels, pledged for the payment of debt." All the cases which he cites, however, are cases of bills by pledgors to redeem the property pledged.

[2] T. I. W. & S. Co., Lim., *v.* P. D. Co., Lim., 29 L. J. Ch. 714. Though the decision in this case is in point, the reason given for it is so extraordinary (namely, that the lien did not confer upon the creditor a power of sale), that it ought not, it seems, to be regarded as settling the question. Presumably, it was because the creditor could not make a sale by his own authority that he applied to the court for a judicial sale.

[3] Demandray *v.* Metcalf, Ch. Prec. 419; Kemp *v.* Westbrook, 1 Ves. 278; Vanderzee *v.* Willis, 3 Bro. C. C. 21.

[4] "If A borroweth 100 £ of B, and after mortgageth land to B, upon condition for payment thereof: if A tender the money to B, and he refuseth it, A may enter into the land, and the land is freed forever of the condition, but yet the debt remaineth, and may be recovered by action of debt." Co. Litt. 209 *b*.

the creditor never has any more than an obligation on the property, yet that obligation is an absolute and unqualified obligation to pay the debt, and hence nothing short of an actual extinguishment of the debt can release the property; and a tender and refusal, so far from extinguishing the debt, leaves it still due and payable.[1]

A pledge, hypothecation, or lien, as has been seen, is generally accessory, collateral, or incidental to a personal obligation by which the debt is created, and which therefore constitutes the principal obligation. A real obligation may, however, itself create a debt and so be a principal obligation; and, in that case, if there be also a personal obligation on the part of the owner of the property to pay the debt, the latter will be merely accessory to the real obligation. There are in English law two real obligations in particular which are always principal obligations, namely, rent and predial tithe. In each of these, the property bound is land; and yet in each it is not the *corpus* of the land, but its fruits, or the income produced by it, that is bound. Each, therefore, according to the nomenclature of the law of Scotland, is a *debitum fructuum*, — not a *debitum fundi*. Hence, each is payable periodically; and hence also, when a payment becomes due, it becomes a personal obligation of the occupier of the land, who has received the fruits out of which the rent or tithe in question was payable. The right to receive either rent or tithe in future is real estate, and is transferable, and, upon the death of its owner, it goes to his heir in the case of rent, and to his successor in the case of tithe; but the moment that a payment becomes due, its character changes, and it becomes personal estate and a *chose en action*, and consequently is not assignable, and on the death of its owner it goes to his executor or administrator. Hence, when an owner of rent or of tithe dies, his right to receive future payments goes in one direction, while the right to receive any payments that may be in arrear goes in another direction.

Rent is created by the act of the owner of the land out of which the rent issues. The act by which a rent is created is either a reservation or a grant. A rent is created by a reservation when the owner of land grants it to another person for years, for life, in tail,

[1] See preceding note. To be sure, if the creditor sue the debtor for the debt, the latter may plead the tender and refusal, but, to make his plea good, he must also allege that he has always been and still is ready and willing to pay the money so tendered, and he must bring the same into court, ready to be paid to the plaintiff, if he will accept it.

or in fee, reserving to himself a rent out of the same, the estate in the rent reserved being generally of the same duration as that granted in the land. A rent is created by grant when the owner of land grants a rent out of the same to another person for years, for life, in tail, or in fee.

At common law, there was a sharp line of demarcation between a rent reserved and a rent granted. 1. Every ordinary grant of land at common law created between the grantor and the grantee the feudal relation of lord and tenant, the latter holding the land from the former, and the former having a reversion, or at least a feudal seigniory, in the land; and hence every rent reserved upon such a grant was a rent payable by a feudal tenant to his feudal lord. 2. Though the parties to that relation were liable at any time to change, yet the relation itself was permanent, *i. e.*, as permanent as the estate granted in the land. 3. The rent was in the nature of a feudal service, to be rendered by the tenant as such to the lord as such; and hence it was necessary, not only that the obligation to pay the rent should follow the land into the hands of any new tenant (which it of course would do, the land being the debtor), but that the right to receive the rent should follow the reversion or seigniory into the hands of any new lord; and this latter object the law accomplished by annexing the right to receive the rent to the reversion or seigniory as an incident or accessory. In short, as the obligation to pay a rent reserved always followed the land out of which it issued, so the right to receive it always followed the reversion or seigniory to which it was annexed. It is true that the lord might at any time sever the rent from the reversion or seigniory by granting away either and retaining the other, or by granting away each to a different person; but by so doing he changed the nature of the rent from that of a rent reserved to that of a rent granted. 4. A right to distrain was a legal incident of every feudal service, and therefore of every rent which was in the nature of a feudal service. 5. As land could be conveyed at common law, even in fee, without a deed (*i. e.*, by livery of seisin), so, on a conveyance of land, a rent could be reserved, even in fee, without a deed.

A grant of a rent, on the other hand, neither created nor accompanied any relation between the grantor and the grantee; it simply created the relation of obligor and obligee between the land out of which the rent was to issue and the grantee of the rent. The relation of the latter to the land was simply that of a creditor, holding

the land as security for the payment of his debt. He had, therefore, no right to distrain, unless such a right was expressly given in the grant. Moreover, a rent could be granted only by deed.

Such were the distinctions between a rent reserved and a rent granted at common law. An anomaly was, however, introduced by the statute of *Quia Emptores*;[1] for it was a consequence of that statute that a grant of land in fee no longer created the relation of lord and tenant between the grantor and the grantee, nor left any reversion or seigniory in the grantor, but operated simply as an assignment of the grantor's tenancy to the grantee; in short, that such a grant created no new feudal relation, but simply changed one of the parties to an old one. It was still possible, notwithstanding the statute, upon a grant of land in fee, for the grantor to reserve a rent, but the nature of a rent so reserved was changed by the statute to that of a rent granted. Indeed, a grant of land in fee, reserving a rent, has had, since the statute, the same effect that two grants would have, namely, a grant of the land, and then a grant of the rent by the grantee of the land.

The payment of either a rent reserved or a rent granted may be secured by the personal covenant of the grantee of the land in the one case, and of the grantor of the rent in the other, and a rent reserved commonly is so secured. Such a covenant, as has been seen, is accessory to the obligation of the land, which is the principal obligation.

In order to understand to what extent it may be necessary for equity to assume jurisdiction over rents, it is necessary first to ascertain what remedies the law provides for the recovery of rents, and to what extent such remedies are available and adequate.

1. At common law, whenever any person to whom a freehold rent was payable had become seised of it, and was afterwards disseised, he was entitled to bring a writ of assize to recover it; but that remedy was never applicable to a rent reserved on a lease for years, or to a rent granted for a term of years, and the remedy itself no longer exists.

2. Upon a rent granted, a writ of annuity would lie at common law to compel its payment, but not upon a rent reserved. The reason why that writ would lie upon a rent granted was that a grant of a rent differed from a grant of an annuity only in being something more, and hence every grant of a rent amounted to the

[1] 18 Edw. I. Stat. 1, c. 1.

grant of an annuity, on the principle that *omne majus in se minus continet.* For the same reason, if a grant of a rent failed as such, *e.g.*, because the grantor had no title to the land out of which the rent was to issue, yet the grant might be good as a grant of an annuity. The same grant could not, however, operate both as a grant of a rent and as a grant of an annuity; and while, therefore, the grantee of a rent always had the option of treating the grant as the grant of an annuity, yet, if he once elected so to treat it, he could not afterwards treat it as a rent. Moreover, as an annuity was a personal obligation, while a rent was a real obligation, a consequence of an election by the grantee of a rent to treat the grant as a grant of an annuity was that the land was discharged, and the grantee had to look to the personal liability of the grantor alone.

From what has been said, the reason is obvious why a writ of annuity would never lie upon a rent reserved; for, as a reservation of a rent is the act of the grantor of the land alone, it would be absurd to say that it can operate as a grant of an annuity by the grantee of the land; and yet it must so operate if a writ of annuity is to lie for recovering it. It would be equally absurd to say that the grantor of the land can by his own act impose a personal obligation upon the grantee of the land.

A writ of annuity, however, like a writ of assize, has ceased to be an available remedy.

3. If the grantee of land, upon the grant to whom a rent is reserved, or the grantor of a rent, covenant to pay the rent, of course the covenantee can sue upon the covenant, if the rent is not paid. The value of such a covenant, however, in case of a rent granted, or in case of a rent reserved upon a grant of land in fee, depends much upon the question whether the covenant runs with the land, — a question which will be considered hereafter.[1]

4. An action of debt would always lie for the recovery of rent, either against the grantee of land, on the grant to whom the rent was reserved, or against the grantor of a rent, or against the assignee of either, so long as he held the land as such assignee. In the case, however, of a freehold rent, this action was of little value, as it would not lie until the last payment of the rent became due.

5. The remedy by way of distress was available in all cases of

[1] See Van Rensselaer *v.* Hays, 19 N. Y. 68.

rents reserved, except where (since the statute of *Quia Emptores*) the reservation was upon a grant of the land in fee, and in all cases of rents granted, and of rents reserved upon grants of land in fee, provided a right to distrain was expressly given.

6. In all cases of rents reserved, even upon grants of land in fee, the estate granted could be made to depend, by means of a condition subsequent, upon payment of the rent, *i. e.*, it could be provided that, in case of failure to pay the rent, the estate of the grantee in the land should cease, and the title to the land revest in the grantor. This remedy was of less value, however, than at first sight it seems to be; for, 1st, the grantor could recover possession of the land, against the will of the grantee, only by an action of ejectment; 2dly, as such a condition worked a forfeiture of the grant, it was regarded by the law with disfavor, and hence the enforcement of it was surrounded by so many difficulties that it became well-nigh impracticable;[1] 3dly, at any time before the grantee was actually dispossessed of the land, he could obtain from a court of equity an injunction against any further proceedings at law, on paying the rent in arrear, with interest and costs; and, 4thly, even after he was dispossessed by means of an action of ejectment, a court of equity would not only restore him to the possession at any time on the terms just stated, but require the grantor to account rigorously for the rents and profits during all the time that he had held the possession.[2] Moreover, such a condition could never be made in case of a rent granted, as there was in that case no grant of the land to which the condition could be annexed.

7. A grantor of a rent,[3] however, as well as a grantor of land,

[1] Duppa *v.* Mayo, 1 Wms. Saund. 282, 287, n. 16. In Jackson *v.* Harrison, 17 Johns. 66, which was an action of ejectment by a landlord against a tenant to enforce a forfeiture for non-payment of rent, the plaintiff was defeated because he demanded the rent in the afternoon of the day on which it became due, instead of demanding it just before sunset.

[2] The statute of 4 Geo. II. c. 28, s. 2, contains the following recital: "Whereas great inconveniences do frequently happen to lessors and landlords, in cases of re-entry for non-payment of rent, by reason of the many niceties that attend re-entries at common law; and for as much as, when a legal re-entry is made, the landlord or lessor must be at the expense, charge, and delay of recovering in ejectment before he can obtain the actual possession of the demised premises; and it often happens that, after such re-entry made, the lessee or his assignee, upon one or more bills filed in the court of equity, not only holds out the lessor or landlord by an injunction from recovering the possession, but likewise, pending the said suit, do run much more in arrear, without giving any security for the rents due, when the said re-entry was made, or which shall or do afterwards incur."

[3] Jemott *v.* Cowley, 1 Wms. Saund. 112.

reserving a rent,[1] could couple with the grant or the reservation of the rent a grant or reservation of the right, in case of failure to pay the rent, to enter upon the land, and retain possession of it until, by receipt of the rents and profits, all arrears of the rent were paid; and, by virtue of this right, the grantee of the rent, or the grantor of the land, or the assignee of either, could recover possession of the land by ejectment. Moreover, as such a right did not operate by way of forfeiture, of course a court of equity would not interfere with its exercise. If, however, the right granted or reserved was to enter upon the land, and take the rents and profits thereof *to his own use*, until all arrears of rent were paid by the grantor of the rent or the grantee of the land, the right would operate by way of forfeiture, — not indeed of the land, but of its rents and profits between the time of entry and the time of payment of the arrears of rent; and hence equity would relieve against the forfeiture.[2] Such was understood by Littleton to be the nature of the right in the case put by him in section 327 of his Tenures.[3]

It may be added that, at common law, an assignee of a rent, whether it were a rent created by reservation or by grant, was not entitled to any of the foregoing remedies, until the tenant or owner of the land had attorned to him. The necessity of attornment was, however, long since abolished.

Of the seven remedies enumerated above, the first and second, as has been seen, no longer exist; the third and fourth are merely personal remedies, — not remedies against the land, — and for that reason alone are entirely inadequate, being of little value except against a solvent defendant; the fifth is a remedy, not against the land bound for the rent, but against movable property found on the land; the sixth is a remedy against the land, not by way of obtaining payment of the rent, but by way of forfeiture for its non-

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[1] "Where a feoffment is made of certain lands, reserving a certain rent, etc., upon such condition, that, if the rent be behind, it shall be lawful for the feoffor and his heirs to enter, and to hold the land until he be satisfied or paid the rent behind, etc., in this case, if the rent be behind, and the feoffor and his heirs enter, the feoffee is not altogether excluded from this, but the feoffor shall have and hold the land, and thereof take the profits, until he be satisfied of the rent behind; and when he is satisfied, then may the feoffee re-enter into the same land, and hold it as he held it before. For in this case, the feoffor shall have the land — but in manner as for a distress, until he be satisfied of the rent, etc., though he take the profits in the mean time to his own use," etc. Litt., s. 327. "The case of Littleton cannot be maintained by reason, but only by the authority of the author." *Per* Kelyng, J., in Jemott *v.* Cowley, T. Raym. 136.

[2] Co. Litt. 203, and Butler's note.

[3] *Supra*, note 1.

payment; and the seventh is a remedy against the land, as a means of obtaining payment of the rent. The last remedy, however, is one which is seldom provided for, and with which few persons are familiar. It is a remedy too which can be enforced only by an action of ejectment, and which will eventually involve an accounting in equity by the person who avails himself of it, unless the parties can agree; and it cannot therefore be deemed a very satisfactory remedy.

That none of the foregoing remedies have been regarded as fully adequate is evident from the legislation which has been enacted, both in England and in this country, upon the subject of remedies for the recovery of rents. The aim of such legislation has been materially different, however, in the two countries. In England, legislation has been directed mainly to the improvement of two of the old remedies, namely, that by way of distress, and that by way of forfeiture. The former of these remedies seems always to have been the favorite one in England, as well with the Legislature as with landlords, and the constant aim has been to render it more efficient and available.[1] The remedy by way of forfeiture has also been materially improved in England, in the interest of landlords, by rendering its prosecution less difficult, by requiring tenants, as a condition of obtaining an injunction, to pay all arrears of rent into court, thus removing from them the temptation to resort to equity for the mere purpose of delay, and by disabling tenants from resorting to equity, except within six months after they are dispossessed.[2]

In this country, on the other hand, the remedy by way of distress has not generally been regarded with favor; tenants have claimed that it savored of feudal bondage and oppression; the public have claimed that it favored one class of creditors at the expense of all others; in some of our States it has never existed; in others it has been abolished; and it is believed that the ten-

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[1] See 17 Car. II. c. 7 (reciting that "the ordinary remedy for arrearages of rents is by distress upon the lands chargeable therewith; and yet nevertheless by reason of the intricate and dilatory proceedings upon replevins that remedy is become ineffectual"); 2 Wm. & M. c. 5 (reciting that "the most ordinary and ready way for recovery of arrears of rent is by distress"); 8 Anne, c. 14; 4 Geo. II. c. 28, s. 5 (reciting that "the remedy for recovering rents seck, rents of assize, and chief rents, are tedious and difficult," and enacting that owners of rents seck, rents of assize, and chief rents shall have the like remedy by distress as owners of rents reserved upon leases); 11 Geo. II. c. 19, ss. 1–10, 19–23.

[2] 4 Geo. II. c. 28, ss. 2, 3, 4.

dency is to abolish it in those States in which it now exists.[1] At the same time, there has been a tendency in this country not to regard a re-entry by a landlord for non-payment of rent as a forfeiture, but rather as a rightful termination by him of the relation existing between himself and the tenant for the default of the latter; and a justification of this tendency may be found in the fact that the only rents with which people have hitherto been familiar in this country are those which are reserved upon leases for short terms, — which constitute the only recompense made by the tenant to the landlord for the land, — and which consequently generally represent the full value of the use of the land. Hence, it has been the general aim of legislation in this country to convert the landlord's remedy by way of re-entry into a universal remedy for non-payment of rent, 1st, by providing very summary and inexpensive proceedings for its enforcement; 2dly, by treating the re-entry and resumption of possession by the landlord, not as a forfeiture, but as a statutory termination of the lease, and therefore making such resumed possession unimpeachable in equity; 3dly, by giving every landlord a right of re-entry for non-payment of rent, whether any condition of re-entry be inserted in the lease or not.[2] It is believed, moreover, that the remedy thus provided

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[1] Lord Kames (Historical Law Tracts, 4th ed., pp. 169, 170), writing about the middle of the last century, said: "In the infancy of government, shorter methods are indulged to come at right than afterward when, under a government long settled, the obstinacy and ferocity of men are subdued, and ready obedience is paid to established laws and customs. By the Roman law, a creditor could sell his pledge at short hand. With us, of old, a creditor could even take a pledge at short hand, and, which was worse than either, it was lawful for a man to take revenge at his own hand for injuries done him. None of these things, it is presumed, are permitted at present in any civilized country, England excepted, where the ancient privilege of forcing payment at short hand, competent to the landlord, and to the creditor of a rent charge, is still in force." In Farley *v.* Craig, 15 N. J. 191, 213, Ford, J. (sitting in a State in which landlords have always been entitled to distrain for non-payment of rent), said: "By distraining, a man carves out justice, without judge or jury, for himself; and it is well enough to have the option; but no prudent man would use it without a great emergency, — much less have such an odious measure forced on him as his only remedy. It is always harsh; the blow comes without a word, on the tenant's property, like a bolt from the sky. It is the tiger's process in hunger. Tenants commonly elude it if they can by fraud or guile, and sometimes resist it by direct violence, such as it seems was preconcerted in this case, and in full readiness, if a distress had been attempted."

[2] The legislation referred to in the text had its origin in the English statute of 11 Geo. II. c. 19, s. 16, which (after reciting that "landlords are often great sufferers by tenants running away in arrear, and not only suffering the demised premises to lie uncultivated without any distress thereon, whereby their landlords or lessors might be satisfied for the rent arrear, but also refusing to deliver up the possession of the

is now more resorted to than all other remedies put together, especially in those States where a right to distrain for non-payment of rent does not exist.

Such being the remedies furnished by courts of law for the non-payment of rent, the question arises whether they are available and adequate in all cases that can happen. In answering this question, it will be convenient to distinguish rents into three classes, with reference to the different purposes for which they may be created.

First, when an ordinary lease is made, reserving a rent, the object of the lessor is simply to obtain an income from property which he does not wish himself to occupy, *i. e.*, from property which he holds as an investment, while the object of the lessee is to obtain the possession and enjoyment of property which he is unable to own, or which he does not wish to own.

Secondly, when land, instead of being sold for a sum in gross, is granted in fee, or for a long term of years, with a reservation of an annual rent, such rent constituting the price to be paid for the land, the object of the grantor is to convert his land into another kind of investment, — an investment which will be as permanent as land and much more secure, which will produce a fixed amount of income, and which will cost its owner the least possible care, anxiety, and trouble. An owner of land, moreover, may not be able to sell it for a sum in gross, except at a great sacrifice, and therefore, unless he submit to such sacrifice, he may have to choose between holding the land indefinitely and disposing of it in the manner just indicated, *i. e.*, between making the land produce a regular income, and suffering it to cause a regular outgo. The object of the grantee, on the other hand, is to obtain the land on credit, either because he is unable to pay for it at once, or because he thinks he can put his money to a better use than that of paying for the land. Moreover, if he obtains the land with a view

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demised premises, whereby the landlords are put to the expense and delay of recovery in ejectment") provides that two or more justices of the peace may put landlords in possession of leased land in a summary manner, (*a*) where the rent is a rack-rent, or a rent of full three fourths of the yearly value of the premises; (*b*) where a year's rent is in arrear; (*c*) where the tenant has deserted the premises, and left the same uncultivated or unoccupied, so as no sufficient distress can be had to countervail the arrears of rent; and (*d*) where by the terms of the lease the landlord is entitled to re-enter for non-payment of rent (Pilton, *Ex parte*, 1 B. & Ald. 369); and that, upon the landlord's being so put in possession, the lease shall become void. By 57 Geo. III. c. 52, the foregoing statute was extended to cases where only one half a year's rent was in arrear, and where the landlord had no right to re-enter.

to improving it, and thus increasing its value, a perpetual ground rent ought to answer his purpose much better than a mortgage; for, (*a*), a mortgagor incurs the constant or oft-recurring liability of being called upon to pay the principal; (*b*), the negotiation of every new mortgage loan is attended with a considerable expense; (*c*), so great is now the desire for permanent and secure investments, which will produce a fixed income, that a well secured perpetual ground rent of one thousand dollars (*e.g.*) ought materially to exceed in value any sum of money that can be borrowed temporarily at an interest of one thousand dollars per annum.

Thirdly, when a rent is granted, without any grant of the land out of which the rent is to issue, the object of the grantor is to raise money on the security of the land; and he grants a rent, instead of giving a mortgage, because he thinks he can thus obtain better terms in respect either to the rate of interest or to the mode of payment. The mode of payment in particular, namely, by uniform annual instalments, may be an attraction to him, especially if the instalments are liable to cease at any moment by the dropping of a life. It is the object of the grantee, however, that is the chief cause of the transaction's taking the shape it does; for he wishes to convert a sum of money which he has in hand into an annuity, commonly for his own life, and thus to increase his annual income by sinking his principal. In such a transaction, it is obvious that security should be the prime consideration with the grantee; for, on the one hand, he parts with the price of the annuity immediately, while, on the other hand, he has to trust the grantor during the whole period that the annuity is to run; and in many cases the annuity will constitute the grantee's only means of livelihood. If, therefore, the annuity takes the shape of a grant of a rent, that is merely for the sake of security; and hence it is a mere accident. The essence of the transaction is an agreement to pay a fixed sum annually, for the period of time agreed upon, in consideration of a sum in gross paid immediately.

For non-payment of rents of the first class, the remedies provided by law seem to be all that can be asked for, especially in places where the remedy by distress is given, in addition to the other remedies before enumerated; and even where that remedy is withheld, a landlord who can summarily dispossess a tenant who fails to pay his rent has not much to complain of. If it be said that this is no remedy for rent already due, it may be answered, 1st, that indirectly it is a very powerful remedy; 2dly, that

no court can give an effective remedy for an unsecured debt against a debtor with no assets. If, indeed, the tenant does not pay for the land entirely by an annual rent, but partly by a rent and partly by a fine (*i. e.*, a sum in gross paid at the commencement of the lease), — a thing which is very common in England,[1] though very uncommon in this country, — a difficulty arises; for in such a case, if the law permits the tenant to be summarily dispossessed for non-payment of rent, and disables him from seeking relief in equity, it is unjust to the tenant, as he in truth loses his lease by way of forfeiture; and, on the other hand, if the law does justice to the tenant, it deprives the landlord of his summary remedy. In this latter case, therefore, equity may be called upon to interfere in the landlord's favor, especially in places where he is not allowed to distrain.

The cases in which reservations of rents of the second class will be found desirable are chiefly those in which vacant land in or near cities and large towns is granted for the purpose of being built upon. In such cases, grants of land in consideration of rents reserved will be likely to promote the interests, not only of the parties to the transaction, but of the public as well, and therefore they should receive all the support and encouragement that the law can afford them.

The practice of granting land in fee for building purposes, in consideration of a rent reserved, has never, it is believed, prevailed in England to any great extent;[2] nor has it in our States, with the exception of Pennsylvania. In that State, however, as well as in Scotland, this practice has prevailed, and still prevails very extensively. It is a significant fact, however, that in Pennsylvania the statute of *Quia Emptores* has never been in force,[3] and that no similar law has ever existed in Scotland.[4]

The practice, however, of leasing land (generally for terms of considerable length and with provisions for renewal) for building purposes has prevailed extensively in England and in New York, and probably also in other parts of this country.

Does the law afford adequate remedies for the recovery of rents

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[1] Compare note 2, pp. 85, 86.

[2] Instances of such grants will be found, however, in Milnes *v.* Branh, 5 M. & S. 411; Apsden *v.* Seddon, 1 Ex. D. 496; Haywood *v.* Brunswick Building Society, 8 Q. B. D. 403.

[3] Ingersoll *v.* Sergeant, 1 Whart. 337.

[4] See Clark *v.* Glasgow Assurance Co., 1 McQ. 668.

reserved upon grants of land in fee for building purposes, or upon building leases, so that the interference of equity will not be necessary? In England, as has been seen,[1] the remedy by distress always exists for the non-payment of rent of any kind, and is the remedy generally resorted to; and where a sufficient distress can be found, it seems to be clearly adequate; but where no sufficient distress can be found, it seems to be equally clear that the mere existence of a right to distrain ought not to prevent the interference of equity. Does the law of England afford any other adequate remedy in the cases now under consideration? It seems not. The only other remedies which can be claimed to be adequate are the sixth and seventh of those already enumerated: but as each of these is slow, and as each of them is likely to be followed by a suit in equity by the rent-payer, the rent-owner ought to be permitted to resort to equity in the first instance. In this country also it seems equally clear that there is no adequate legal remedy, unless the remedy by distress exists, and there be a sufficient distress, or unless the rent-owner have a summary remedy for the recovery of the land itself. Moreover, this latter remedy does not exist where there is no relation of landlord and tenant, and therefore it does not exist (unless in Pennsylvania) where a rent is reserved upon a grant of land in fee; and it ought not to exist in any case of a building lease, as it will have the effect of depriving the tenant definitively of all his interest in the land by way of penalty and forfeiture, and will thus not only work a great injustice to such tenant, but also an injury to the public by discouraging the acceptance of such leases.

Life annuities are likely to be a favorite form of investment wherever money is plenty and the rate of interest low; but where money is scarce, and the rate of interest is high, they are likely to be in little vogue. Accordingly, they have always been in extensive use in England, while in this country, until within a very recent date, they have been almost unknown. In the future, however, they are likely to be as much in favor here as in England.

When such annuities are granted in the form of rents, the question of equity's assuming jurisdiction over them is substantially the same in England as in the class of cases last considered. In modern times, however, when annuities are granted in England, special provisions are generally made in each case for their security;[2] and

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[1] *Supra*, p. 84, n. 1.

[2] See Lumley on Annuities, p. 214.

therefore, when equity is applied to by an annuitant, it is seldom on the mere ground that the annuity constitutes a rent. In this country, the purchase and sale of annuities is never likely to be the subject of special bargains between private persons; but the granting of annuities is likely to be confined to companies organized for that purpose (among others), and such companies publish the terms on which they will grant annuities, and these terms are uniform, and hence the granting of an annuity will never be the subject of a special bargain; and every annuity will be granted on the personal credit alone of the company granting it. In short, an annuity is never likely in this country to take the form of a rent. Indeed, the practice of granting rents is believed never to have existed, to any appreciable extent, in this country; and it is not likely to exist in the future.

Returning now to the general question of the jurisdiction of equity over rents, it may be said with confidence that the owner of a rent of any kind is entitled to have the same paid, if the income of the land out of which it issues is sufficient to pay it, and that it does not lie in the mouth of the tenant of the land to say that the income is insufficient. It may be asked, therefore, why every owner of a rent is not entitled to invoke the aid of equity as of course upon showing that his rent is in arrear; and it may be answered, first, that the law of England has shown a full appreciation of the claims of rent-owners by providing them with an extraordinary and exclusive remedy, — one, too, which they can themselves enforce without the aid of any court, — and by protecting that remedy carefully as well against the frauds of tenants as against the competing claims of other creditors, — namely, that of distress; and that it is the clear policy of that law to require rent-owners to exhaust the remedy thus provided before seeking a more specific one against the income of the land; and that, while the law of such of our States as still retain the remedy of distress is much less pronounced in its favor than the law of England, yet it would be clearly against the policy of the law in all such States for equity to interfere in favor of rent-owners before the remedy by distress has been exhausted. Secondly, that in most of our States, as has been seen, landlords can terminate, in a summary manner, their relations with tenants who fail to pay their rents, and that a rent-owner who has that power cannot invoke the aid of equity, since the law gives him all that equity can give him, and even more. Where, however,

the right to distrain is not given, or where that remedy has been exhausted and still the rent is in arrear, and where the rent-owner is not entitled by summary proceedings to recover possession of the land out of which the rent issues, and that too by a title unimpeachable at law or in equity, it seems clear that he is entitled to the aid of equity, for the purpose of securing the application of the net income of the land to the payment of the rent.

It remains to call the reader's attention briefly to the authorities upon the subject of the jurisdiction of equity over rents. Equity began to interfere in favor of rent-owners as early as the reign of Elizabeth, and the time of Lord Chancellor Ellesmere. At first, however, it confined its interference to the cases in which there was some obstacle (which equity regarded as technical and unsubstantial) in the way of a legal remedy. Thus, in Web *v.* Web[1] (42 Eliz.), where a rent was given by will, without any right to distrain, or any right to enter for non-payment, and the devisee had not been able to obtain seisin, and consequently could neither have a writ of assize, nor a writ of annuity, nor an action of covenant, nor an action of debt (as the rent was undoubtedly for the life of the devisee at least), nor distrain, nor enter upon the land, it was decreed that the tenant of the land pay the rent, notwithstanding the want of seisin in the devisee. So in Ferrers *v.* Tanner[2] (44 Eliz.), which presented substantially the same facts, the plaintiff was relieved, though it is not clear what was the relief given. According to one book, the defendant was simply decreed to give seisin to the plaintiff. The further fact is stated that the devisee of the land promised the testator to pay the rent, and thus prevented his taking other means of securing its payment; and this latter fact was regarded as strengthening the case in point of jurisdiction. Again, in Shute *v.* Mallory[3] (5 Jac. I.), where a lessor had assigned his reversion to the plaintiff, and the lessee (the defendant) refused to attorn, Lord Chancellor Ellesmere decreed him to attorn, and to pay the rent. In the foregoing cases, however, it is to be observed that the bill was not founded directly upon the ownership of the rent, but upon an equitable obligation (*i. e.*, an obligation imposed upon the defendant by equity) either to give the plaintiff seisin and to attorn to him, or not to set up the defence of want of seisin or want of attornment.

[1] Moo. 626.

[2] Moo. 626, pl. 85; cited 1 Ch. Cas. 147 (*nom.* Ferris *v.* Newby), and 3 Ch. Cas. 91.

[3] Moo. 805.

Therefore, in strictness, these cases do not belong to the present inquiry.

It is further to be observed that, in such cases, according to modern practice, if the merits of the plaintiff's case be controverted by the defendant, there must be a trial at law, under the direction of the court of equity, before final relief can be given; and the court of equity, in decreeing a trial at law, will direct that the defendant do not set up the defence (*e. g.*) of want of seisin, or want of attornment. It will be seen, therefore, that the obligation which equity enforces in such cases is always negative. If, indeed, equity should treat the obligation as affirmative, and decree the defendant (*e. g.*) to give the plaintiff seisin, or to attorn to him, it would stop there, and leave the plaintiff to sue at law independently of equity, just as if he had obtained seisin or an attornment without the aid of equity; but in modern times equity declines to give such relief, and for very good reasons. If equity interferes at all, it will insist upon controlling the entire litigation; and if a trial at law is necessary, it will insist upon its being had under its own direction.

If a rent be reserved or granted out of incorporeal property, *e. g.* out of tithes,[1] or out of a manor in which there are no demesne lands, and which consists, therefore, only of a seigniory or services,[2] or out of tolls,[3] as there can of course be no distress, a bill in equity to enforce payment of the rent will be entertained. So if an owner of rent be unable to identify the land out of which the rent issues, because of the uncertainty and confusion of boundaries, and therefore cannot distrain, he will be entitled to come into equity to have the boundaries of the land ascertained, and payment of the rent enforced.[4] So if the existence of a rent be clearly proved, but it cannot be ascertained what kind of rent it is, and hence the owner of it cannot distrain, he will be entitled to relief in equity.[5] There seems to be the same reason for giving relief in equity to an owner of rent who has no right to distrain, though there seems to be no

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[1] Thorndike *v.* Allington, 1 Ch. Cas. 79; Busby *v.* Earl of Salisbury, Finch, 256, cited (*nom.* Berkeley *v.* Salisbury), 2 Bro. C. C. 518.

[2] Duke of Leeds *v.* Powell, 1 Ves. 171.

[3] Duke of Leeds *v.* New Radnor, 2 Bro. C. C. 338.

[4] Boreman *v.* Yeat, cited 1 Ch. Cas. 145; Cocks *v.* Foley, 1 Vern. 359; North *v.* Strafford, 3 P. Wms. 148; Benson *v.* Baldwyn, 1 Atk. 598; Duke of Bridgewater *v.* Edwards, 6 Bro. P. C. (Toml. ed.) 368.

[5] Collet *v.* Jaques, 1 Ch. Cas. 120; Cocks *v.* Foley, 1 Vern. 359.

authority directly upon the point.[1] The absence of English authority may be due to the fact that no such question can have arisen in England since the statute of 4 Geo. II. c. 28, s. 5.[2] It has been held, in two cases,[3] that the fact that no sufficient distress can be found on land out of which a rent issues, does not authorize the owner of the rent to resort to equity for relief; but it seems impossible to support these cases upon any principle. It is admitted that equity will interfere, if the right to distrain be rendered fruitless by fraud; and yet fraud does not seem to affect the question. The ground upon which a rent-owner must be relieved in equity, if at all, is the want of a sufficient remedy at law, and whether that ground exists or not, does not at all depend upon the conduct of the rent-payer. If, indeed, the supposed fraud could be made the ground of relief, the case might be different; but that seems to be impossible. To prevent a distress by fraud is, like any other fraud, a tort; and, such a fraud having been committed, the only way in which equity can relieve against it is by compelling the tortfeasor specifically to repair his tort; but how can equity compel the specific reparation of such a tort? It was, indeed, prayed in one case[4] that a sufficient distress be set out by the defendant, but the granting of such relief would clearly be out of the question.

If a court of equity assume jurisdiction of a bill to enforce the payment of rent, what will be the relief which it will grant against the land out of which the rent issues? It was held in one well considered case[5] that a sale of the land would be directed, and the proceeds of the sale applied to the payment of the rent. But there seem to be two serious objections to such a course: 1st, such relief is not well adapted to a case where payments in annual, semi-annual, or quarterly instalments are to be provided for, perhaps for an indefinite period; 2dly, a rent, as has been already seen, is not in its nature a charge upon the *corpus* of the land out of which it issues, but merely upon its fruits and income; and when a court of equity gives relief upon the foundation of a legal right, it cannot extend its relief beyond the legal right. It seems, therefore, that

[1] In Champernoon *v.* Gubbs, Ch. Prec. 126, the plaintiff's counsel said: "If the rent had been granted without any clause of distress, or any other remedy at law, he might have had relief here."

[2] See *supra*, p. 84, n. 1.

[3] Davy *v.* Davy, 1 Ch. Cas. 144; Champernoon *v.* Gubbs, 2 Vern. 382.

[4] Champernoon *v.* Gubbs, 2 Vern. 382; Ch. Prec. 126.

[5] Cupit *v.* Jackson, 13 Price, 721.

the appointment of a receiver, and the application through him of the net income of the land to the payment of the rent, is the proper relief against the land. It seems, however, that, in case of a rent reserved, any deficiency of income in any year must be made good out of the surplus income of any subsequent year; and, in case of a rent granted, if for a limited period of time, it seems that the owner of the rent is entitled to receive the net income of the land until all arrears of the rent are paid.

In one case,[1] the plaintiff prayed the court to decree to him the possession and enjoyment of the land until, by receipt of the rents and profits, he should be paid what was due to him, and his counsel cited two unreported cases in which he said such relief was given; but this seems to be inadmissible, as going beyond the plaintiff's legal rights; and even if such relief were admissible, the appointment of a receiver would be a much more judicious course.

Although a rent-owner is entitled to go into equity only for the purpose of obtaining relief against the land, yet, if he obtain relief against the land, equity will give him relief also against the defendant personally, so far as the defendant is by law personally liable for the rent. Great care must, however, be taken not to direct a defendant, in general and unqualified terms, to pay whatever shall be due to the plaintiff, unless the defendant is by law liable for the whole of the rent. If the defendant has absolutely covenanted to pay the rent, of course he is liable on his covenant, and no difficulty will arise. But if his liability is only by reason of his having been the assignee of the term on the creation of which the rent was reserved, or the grantee of the estate out of which the rent was granted, his liability will begin only when the assignment or grant is made to him, and it will continue only so long as the term or estate remains vested in him; and such a defendant can never be directed by the decree in general and unqualified terms to make payments of rent thereafter to accrue, for even if the estate remain vested in him when the decree is made, it will be liable to be devested, and his liability thus terminated, at any moment. On the other hand, he will be liable absolutely for all the rent that has accrued during the time that the estate has been vested in him, and his liability will not be limited to his receipts. In short, the defendant will either be liable absolutely, or he will not be liable

[1] Champernoon *v.* Gubbs, *supra.*

at all; and, therefore, there would seem to be no propriety in directing him to account for the rents and profits of the land.

Passing now from the subject of rent to that of tithe, it may be remarked that the latter, unlike the former, has ceased to be of much practical importance even in England, and hence the law applicable to it is chiefly interesting for the principles which it involves.

Attention has already been called to a few points in which rent and tithe are alike;[1] but perhaps their differences are more important than their resemblances. First, rent, as has been seen, is created entirely by the acts of the parties interested in it, and its form and incidents are such as the parties choose, within the limits of the law, to give it. In short, the law has no purpose of its own to serve, nor any policy of its own to promote, in regard to rent; and in this respect rents may be likened to contracts. In regard to tithe, however, it is very different; for every obligation to pay tithe is created by the law alone; and hence the nature of the obligation is such as the law makes it, while its form and incidents are such as the law gives it. Moreover, the law by which the obligation is created is uniform in its operation, and hence the nature of the obligation, and also its form and incidents, are always the same; and therefore it follows that the subject of tithe is primarily much less complex than that of rent. Indeed, the creation of the obligation to pay tithe is simply an act of sovereign power, exercised at the expense of private persons, but for the benefit of the public. In truth, tithe is a species of tax; and the law governing it is a part of the public law of the State. According to modern ideas, this tax should be collected and applied by public authority; but in fact the right to receive the tithes payable in each parish is vested in the parson of the parish as a private right: otherwise there would be no propriety in speaking of the subject of tithe in this place.

Secondly, while a rent is generally payable in money, — the amount of which is fixed, and constitutes a debt in the strict English sense, — predial tithe is always by law payable in kind,[2] *i. e.*, it consists of one tenth of the actual produce of the land. Hence it is necessary that the tenth part be separated from the other nine parts before the tithe-owner can receive his tithe; but the moment that a separation takes place, the right of the tithe-owner undergoes

[1] See *supra*, p. 78.

[2] There seems to be no doubt that rent also was in fact originally payable in kind.

a change; for the title to the tenth part then vests in him as its owner. Moreover, the separation of the tenth part from the other nine parts was a duty imposed upon the tithe-payer (*i. e.*, the occupier or owner of the land); and the performance of this duty (which was called the setting out of tithe, and which was the only duty or obligation imposed upon the tithe-payer) constituted the payment of tithe.

Thirdly, tithe was originally the mere creature of the canon law; and, as that law could not create a real obligation, payment of tithe was secured only by means of the personal duty before mentioned, imposed upon the tithe-payer, and enforced by ecclesiastical censures, or by such other penalties as the civil power placed at the disposal of the canon law judge. At a very early day, however, — as early, indeed, as the time of the Heptarchy,[1] — the right of the Church to receive tithe was recognized in England by the civil power, and thus the right became a real obligation, though the personal duty still remained as before.

Fourthly, while the civil power thus changed the nature of tithe, it did not provide any new remedy, except indirectly and by way of penalty,[2] for enforcing its payment; and hence a suit in the ecclesiastical courts continued to be the ordinary remedy for enforcing the payment of tithe until comparatively modern times, when the jurisdiction of those courts was superseded by the Court of Chancery. This change of jurisdiction, however, caused no change in the nature of the remedy. The suit for tithe in the ecclesiastical courts was founded on the duty to set out tithe, and on the breach of that duty by the defendant, and the foundation of a suit in equity for tithe is the same. Since, however, a suit in equity for tithe is not founded, except indirectly, upon the real obligation to pay tithe, this is not the proper place to consider the nature and incidents of such a suit, or the reasons for equity's entertaining it.

Fifthly, the result therefore is that we have the singular anomaly of a real obligation without any remedy against the land on which the obligation rests, and consequently without any "real" security for the performance of the obligation. The reasons for this, however, are not exclusively historical. From the nature of the

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[1] 2 Bl. Com. 25, 26; 3 Burn's Eccl. Law (Phillimore's ed.), 679.

[2] See 2 & 3 Edw. VI. c. 13, s. 1. By 32 Hen. VIII. c. 7, s. 7, rent-owners were authorized in certain cases to bring writs of assize and other appropriate real actions to establish their rights; and it was consequently held that ejectment might be brought for the same purpose, as a substitute for a real action.

obligation, as has been seen, the remedy can be only against the products of the land, — not against the land itself. From the nature of the obligation also, it is not easy to give the tithe-owner any legal claim against the products of the land until the tenth part is separated from the other nine parts. Could the ecclesiastical courts, or courts of equity, have enforced specific performance of the duty of setting out tithe, or specific reparation of a breach of that duty, and thus have afforded to the tithe-owner an effective "real" security, at least from the moment when the tithe was set out? No, clearly not. First, there is only one time when tithe can, in the nature of things, be effectively set out, namely, when the crops have been severed from the soil, but still remain in the field where they grew; and it is not practicable for any court to compel the doing of anything at any precise time. Secondly, for the same reason, specific reparation is out of the question. Thirdly, the setting out of tithe consists of so many particulars, and involves so much exercise of judgment, care, and honesty, that it would be very injudicious for any court to attempt to enforce it specifically.

The conclusion therefore is that a compensation in money seems to be the only remedy practicable for a refusal or neglect to set out tithe, without a radical change in the nature of the obligation itself.

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